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Supreme Court, U.S.
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No. 99 - 897__

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

STATE OF NORTH CAROLINA,

Petitioner,

v.

NORRIS CARLTON TAYLOR,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Norris Carlton Taylor, by his undersigned counsel, asks leave to file a petition for Writ of Certiorari without pre-payment of costs and to proceed *in forma pauperis* pursuant to Rule 39. Respondent was found indigent by the state and federal courts of North Carolina. A declaration of indigency in support of this motion is attached hereto.

This the 25th day of January, 2000.

Respectfully submitted,

Kenneth J. Rose

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21 pp

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OCTOBER TERM 1999

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STATE OF NORTH CAROLINA,

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v.

NORRIS CARLTON TAYLOR,

Respondent.

****

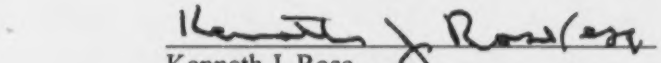
CERTIFICATE OF SERVICE

****

I, Kenneth J. Rose, a member of the bar of this Court, hereby certify under penalty of perjury that on the 25th day of January, 2000, one copy of the Petition for Writ of Certiorari, and Petitioner's Request to Proceed *in forma pauperis* in the above-entitled case were served on H. Alan Pell, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the State, by first-class mail, postage pre-paid. I further certify under penalty of perjury that all parties required to be served have been served.

This the 25th day of January, 2000.

Respectfully submitted,



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No. 99-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

NORRIS CARLTON TAYLOR,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, NORRIS CARLTON TAYLOR, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition are true.

1. Are you presently employed? Yes ____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of wages or salary per month which you received.

1976

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account (including any funds in prison accounts)? Yes X No ___

a. If the answer is yes, state the total value of items owned. $ 28.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, other other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SWORN TO UNDER PENALTY OF PERJURY, this the 10th day of November, 1999.

Norris C. Taylor

NORRIS CARLTON TAYLOR

No. 99 - 897

IN THE
SUPREME COURT OF THE UNITED STATES
October TERM 1999

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R.C. LEE, WARDEN,

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NORRIS CARLTON TAYLOR,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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Death Penalty Case

QUESTION PRESENTED

I. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS HAS PROPERLY CONSTRUED CONGRESSIONAL INTENT, AND STATE POST-CONVICTION PROCEDURAL LAW, BY HOLDING THAT THE LIMITATION PERIOD FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS IS TOLLED FROM THE TIME A PETITIONER PROPERLY FILES AN APPLICATION FOR STATE COLLATERAL REVIEW UNTIL THE PETITIONER HAS PROPERLY EXHAUSTED ALL POST-CONVICTION REMEDIES AFFORDED BY THE STATE.**

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No. 99 - 897

IN THE
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R.C. LEE, WARDEN,

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v.

NORRIS CARLTON TAYLOR,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

NOW COMES Respondent, Norris Carlton Taylor, and requests that the Court deny the State of North Carolina's Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit that vacated the district court's order summarily dismissing Mr. Taylor's first Petition for Writ of Habeas Corpus.

As explained below, the Petition for Writ of Certiorari should be denied because the State has not presented a question worthy of this Court's review. The federal courts that have analyzed how to calculate the limitation period and tolling provisions codified at 28 U.S.C. §2244(d) have uniformly concluded that the limitation period should be tolled during the pendency of the entire period necessary for exhaustion of an application for post-conviction

review properly filed under state law. This construction of §2244(d)(2) accords with Congressional intent; there is no division among the federal courts on this issue, and, consequently, there is no justification for this Court to expend its scarce resources reviewing the State's Petition.

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is satisfied with the State's submissions as to jurisdiction and constitutional and statutory provisions and, pursuant to Supreme Court Rule 24.2, has nothing to add.

STATEMENT OF THE CASE

Norris Carlton Taylor was convicted of first degree murder and sentenced to death in 1979. Following direct appeal and one round of state post-conviction review, Mr. Taylor filed his first Petition for Writ of Habeas Corpus on July 6, 1993. This Petition included unexhausted claims and, consequently, on July 28, 1993, Mr. Taylor filed a second application for state collateral review.

The State moved to dismiss Mr. Taylor's habeas petition for failure to exhaust state remedies, and the district court granted this request on November 8, 1993, dismissing the petition without prejudice. The State filed a response to Mr. Taylor's second application for state collateral review on March 21, 1996, and in May of the same year, the Superior Court of Cumberland County conducted two hearings on Mr. Taylor's claims. On May 23, 1996, the Superior Court denied relief on all claims and ordered a transcript of the recent hearings. That transcript was delivered to counsel for Mr. Taylor on August 23, 1996, and thereafter on October 22, 1996, in full compliance with state appellate rule, Mr. Taylor filed a timely petition for

certiorari review in the Supreme Court of North Carolina. *See* N.C.R.App.P. 21(f). The Supreme Court considered the petition, entered an order reaching the merits of one claim previously defaulted by the Superior Court, and denied relief on February 10, 1997. *State v. Taylor*, 345 N.C. 352, 483 S.E.2d 190 (1997).

While his second application for post-conviction review was pending in the Superior Court of Cumberland County, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Among the amendments included in the AEDPA was a one-year statute of limitation for the filing of a petition for writ of habeas corpus. 28 U.S.C. §2244(d). Following exhaustion of state remedies and in compliance with this statute, Mr. Taylor filed his Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina on February 2, 1998, less than one year after the Supreme Court of North Carolina had denied *certiorari* review of his second application for state collateral review.

The State moved to dismiss Mr. Taylor's habeas petition on the grounds that it was untimely pursuant to §2244(d). The State conceded that the limitation period was tolled between April 24, 1996, the date the AEDPA was enacted, and May 23, 1996, the date of the Superior Court's order denying relief. The State also conceded that the limitation period was tolled from October 22, 1996, the date on which Mr. Taylor's *certiorari* petition was filed in the state supreme court, until February 10, 1997, the date that court denied relief. However, the State contended that the period of limitation was not tolled during the gap between the trial and appellate stages of state post-conviction review. Specifically, the State argued that the limitation period was not tolled between May 23, 1996, and August 23, 1996, the time it took a State-employed court reporter to prepare transcripts necessary for proper review of Mr. Taylor's *certiorari* petition. In addition, the State argued that the limitation period was not tolled during

the 60 days allowed by appellate rule for the preparation of a *certiorari* petition in a capital case. *See* N.C.R.App.P. 21(f).

Mr. Taylor argued that it was plainly Congress's intent both to expedite habeas review in capital cases and to ensure that state courts were afforded a meaningful opportunity to review, in the first instance, claims of constitutional error. Mr. Taylor noted that his construction of the term "pending" in §2244(d)(2) was consistent with both of Congress's goals and that the State's "gap" theory risked compromising full exhaustion of state court remedies.

While "frank to say" that it found "both arguments compelling," the district court granted the State's motion to dismiss on June 9, 1998. On November 18, 1998, the district court denied Mr. Taylor's motion to alter or amend judgment, and Mr. Taylor thereafter appealed to the Fourth Circuit Court of Appeals.

That Court, on July 29, 1999, issued an opinion vacating the district court's order of summary dismissal. The Fourth Circuit rejected the State's gap theory and concluded that, under §2244(d)(2), the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court, was tolled from the limitations period. *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999). The State has asked this Court to review the Fourth Circuit's decision.

ARGUMENT

I. THE FOURTH CIRCUIT'S CONSTRUCTION OF 28 U.S.C. §2244(D)(2) COMPORTS WITH THE ORDINARY MEANING OF "PENDING."

Newly-amended 28 U.S.C. 2244(d)(2) provides as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or

claim is pending shall not be counted toward any period of limitation under this subsection.

The State contends in its Petition that the court below "defined the statutory term 'pending' both broadly and contrary to its ordinary meaning." Petition at 13. The State's contention is utterly belied by the fact that nearly 30 federal courts, including eight circuit courts of appeal have all read the word "pending" the same way the Fourth Circuit did. In the following nine reported cases, federal courts have expressly rejected the gap theory propounded by the State:

Bennett v. Artuz, ___ F.3d ___, 1999 WL 969697, 1999 U.S. App. LEXIS 26514 (2nd Cir. October, 25, 1999)[1]

Nino v. Galvez, 183 F.3d 1003 (9th Cir. 1999)

Barnett v. Lemaster, 167 F.3d 1321 (10th Cir. 1999)

Hudson v. Jones, 35 F.Supp.2d 986 (E.D. Mich. 1999)

Deerwester v. Carter, 26 F.Supp.2d (C.D. Ill. 1998)

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United States ex rel. Gonzalez, 6 F.Supp.2d 780 (C.D. Ill. 1998)

Matthews v. Abramajtys, 39 F.Supp.2d 871 (E.D. Mich. 1999)

Davis v. Keane, 9 F.Supp.2d 391 (S.D.N.Y. 1998)

In the following 15 published decisions, federal courts have implicitly rejected the gap theory and interpreted the limitation period and tolling provision in the manner adopted by the Fourth Circuit in *Taylor*:

Mills v. Norris, 187 F.3d 881 (8th Cir. 1999)[2]

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[1] *Bennett* was decided after issuance of the Fourth Circuit opinion in *Taylor*.

Gaskins v. Duval, 183 F.3d 8 (1st Cir. 1999)

Guenther v. Holt, 173 F.3d 1328 (11th Cir. 1999)

Gendron v. United States, 154 F.3d 672 (7th Cir. 1998)

Lovasz v. Vaughn, 134 F.3d 146 (3rd Cir. 1998)

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As noted by the Tenth Circuit in *Barnett*, the construction of "pending" advanced by Mr. Taylor "comports with the generally-accepted definition of the term." 167 F.3d at 1323. A case is "pending" exhaustion until the state courts have had a full opportunity to review and correct any claim of constitutional error. *Rose v. Lundy*, 455 U.S. 509, 532 (1982). In addition, retroactivity analysis treats a case as "pending" through disposition of any appeal. *See, e.g., Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1989); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir. 1972). Similarly, abstention doctrine treats as "pending" those cases in

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[2] *Mills* was decided after issuance of the Fourth Circuit opinion in *Taylor*.

which state remedies have not been exhausted. *Huffman v. Pursue, LTD.*, 420 U.S. 592, 608 (1975).

It is a well-settled rule of statutory construction that when Congress

> borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952).

No United States Court of Appeal has found the gap theory to represent the ordinary or sensible meaning of the word "pending" as that term appears in §2244(d)(2). Furthermore, other than *dicta* in a scheduling order issued by a lone magistrate judge in North Carolina, the State can point to no published opinions adopting its gap theory. *See Moseley v. French*, 961 F.Supp. 889 (M.D.N.C. 1997).

Lacking any controlling authority in its favor on the dispositive issue -- the meaning of the term "pending" in §2244(d)(2) -- the State attempts to distract this Court with references to a recent North Carolina decision construing the word "pending" for purposes of a state discovery statute. *See* Petition at 24-28. However, the issue before the Court does not turn on state law.[3] The meaning of the term "pending" in §2244(d)(2) is an issue of federal law. *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999). And it is very clear that, under federal law, a post-conviction

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[3] Moreover, a motion for appropriate relief is "pending" while the defendant, in compliance with state law, seeks *certiorari* review in the appellate division and, consequently, the State is prohibited from setting an

motion is "pending" from the time of initial filing until disposition by the state's highest court. That, as the weight of authority has clearly concluded, is the "ordinary" meaning of "pending".

II. THE FOURTH CIRCUIT'S CONSTRUCTION OF 28 U.S.C. §2244(D)(2) COMPORTS WITH CONGRESSIONAL INTENT.

The construction of the tolling provision of the one-year limitation period for the filing of federal habeas petitions adopted by the court below fully accords with Congress's intent in enacting the AEDPA:

> to curb the lenghty delays in...federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies.

H.R.Rep. No. 23, 104th Cong. 1st Sess. (1995) pp. 9-10.

In order to curb delay, Congress enacted a one-year statute of limitations for the filing of habeas petitions. 28 U.S.C. §2244(d)(1). In order to preserve the availability of habeas review for prisoners who diligently pursue state remedies, Congress provided for tolling of the statute of limitations. Thus, 28 U.S.C. §2244(d)(2) excludes from the limitation period the "time during which a properly filed application for State post-conviction or other collateral review...is pending."[4] There can be no question but that Congress enacted the tolling provisions to accommodate exhaustion; indeed, there could be no other reason to permit tolling.[5]

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execution during the 60-day period given by N.C.R.App.P. 21(f) for the preparation of a *certiorari* petition. N.C.G.S. §15-194.

[4] Congress was unwilling to trade off either of these aims at the expense of the other, and thus expressly rejected a proposal to eliminate the exhaustion requirement. 141 Cong. Rec. S7831-33, S7847 (daily ed. June 7, 1995).

[5] Elsewhere in the AEDPA, Congress underscored its commitment to ensuring exhaustion and preserving the role of state courts in protecting federally guaranteed rights. Relief may not be granted on unexhausted claims,

The State's gap theory is wholly inconsistent with Congress's goals in enacting the AEDPA. Not only does the gap theory negligibly speed up the filing of federal habeas petitions, but it risks federal intrusion into state criminal proceedings. *See Lovasz v. Vaughn*, 134 F.3d 146, 148 (3rd Cir. 1998). It cannot be credibly claimed that the collateral review process will be slowed in any meaningful way if tolling is permitted, for example, during the 60 days permitted by North Carolina appellate rules for preparing a pleading essential for exhaustion.[6] However, the threat to the states' interest in requiring full exhaustion prior to seeking review in federal habeas proceedings is very real. Of the 24 cases cited in the first section, almost all of them share the Fourth Circuit's view that tolling the entire period of state post-conviction proceedings "upholds 'the principle of comity that underlies the exhaustion doctrine.'" *Taylor*, 186 F.3d at 561. In contrast, the gap theory is "antithetical to the entire theory of state remedy exhaustion," *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999), and "force[s] appellants into federal court prematurely, before 'giving . . . state courts [a] full opportunity to resolve any constitutional issues." *Bennett v. Artuz*, 1999 U.S. App. LEXIS 26814 at *9 (elipsis and second bracket in original).

When a state devises its system for post-conviction review, it does so in response to state concerns and in recognition of its particular needs. The lunacy of the State's gap theory becomes readily apparent when one considers its application to the several states. For example, the more stages of a state provides, the more gaps there are. And, to the extent a federal court counts these

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28 U.S.C. §2254(b)(1)(A); and a state cannot be simply deemed to have waived exhaustion but must expressly waive the exhaustion requirement, 28 U.S.C. §2254(b)(3).

[6] In order to exhaust post-conviction claims, a capital defendant in North Carolina must present her claims in a motion for appropriate relief filed in the superior court and seek *certiorari* review in the appellate division. *Strader v. Allsbrook*, 656 F.2d 67 (4th Cir. 1981).

gaps against a prisoner for purposes of §2244(d)(2), the result is double counting of the same time -- once by the state courts clocking the time between the different stages of post-conviction review and again by the federal habeas court clocking the same time period.

By embracing "double counting," the gap theory means that, depending on a state's system of post-conviction review, different states will either have a different limitations period or different accommodation for exhaustion. In addition, "double counting" means a prisoner will necessarily have to devote less time to preparing state pleadings than was contemplated by the state when it established its system of post-conviction review. Certainly it is "unlikely that Congress intended its tolling provision to result in indifference to, or even interference with, a given state's handling of petitions for post-conviction review." *Villegas v. Johnson*, 184 F.3d 467, 472 (5th Cir. 1999).

Interpreting a statute of limitation and its corresponding tolling provision is meant to be an "uncomplicated task . . . rather than a source of uncertainty, and unproductive and ever increasing litigation." *Wilson v. Garcia*, 471 U.S. 261, 275 (1985). The State argues for a construction of §2244(d) that varies from jurisdiction to jurisdiction depending on the structure of post-conviction review adopted by the state. It is simply ludicrous to imagine that Congress intended to delegate to the states the task of determining what "pending" means for purposes of §2244(d). In the instant case, the Fourth Circuit adopted a rule of construction that accords with the plain meaning of the legislative text and with the goals of the enactment. Further, the Fourth Circuit's construction of §2244(d) provides litigants with rule that can be "applied with ease and predictability in all 50 States." *Owens v. Okure*, 488 U.S. 235, 243 (1989).

The State asks this Court to accept review in this case and to create a rule that is contrary to Congressional intent and common sense, and is complicated and unpredictable in application. The Court should decline the State's suggestion and deny the writ of *certiorari*.

CONCLUSION

Summary dismissal of a first habeas petition is a "particularly serious matter" which risks injury to an important interest in human life; consequently, "any rule that would deprive inmates of all access to the writ should be both clear and fair." *Lonchar v. Thomas*, 517 U.S. 314, 324, 330 (1996). The rule proposed by the State is neither, and, for the reasons stated herein, Mr. Taylor respectfully requests that the Court deny the State of North Carolina's Petition for Writ of Certiorari.

Respectfully submitted, this the 25th day of January, 2000.

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